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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

BETTY S. RACER and DAVID RACER,
Appellants,

vs.

JOHNSON and JOHNSON,
Appellee.

On appeal from the Missouri Court of Appeals
Eastern District

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether the April 14, 1982 Order of the Missouri Court of Appeals, Eastern District, violates the due process and equal protection clauses of the 14th Amendment to the U. S. Constitution in depriving the Plaintiffs of their property by prohibiting the Plaintiffs from collecting on the actual damage judgments in their favor against Johnson and Johnson until the Plaintiffs' claims for punitive damages against Johnson and Johnson are finally resolved, even though Johnson and Johnson has exhausted all rights of appeal on the judgments for actual damages and no rights of Johnson and Johnson will be jeopardized by allowing Plaintiffs to collect on the judgments for actual damages prior to the punitive damage claims being finally resolved?

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On appeal from the Missouri Court of Appeals
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JURISDICTIONAL STATEMENT

Appellants' appeal from the amended mandate of the Missouri Court of Appeals, Eastern District, entered April 14, 1982, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and a substantial federal question is presented. U. S. Supreme Court Rule 15, 28 U.S.C.A. §1257(2).

OPINIONS BELOW

The Judgement of the Circuit Court of St. Francois County, Missouri, and the Missouri Court of Appeals, Eastern District of Missouri Opinion and Mandate and subsequent Orders Amending the Mandate are set out in the appendix. The deci-

sion of the Missouri Court of Appeals, Eastern District, is reported as *Racer* v. *Utterman*, 629 S.W.2d 387 (E.D. Mo. 1981).

JURISDICTION

The Missouri Court of Appeals, Eastern District of Missouri, by its Opinion dated September 22, 1981, affirmed the Judgments, based on jury verdicts in favor of the Plaintiffs for their actual damages against Johnson and Johnson, totaling $382,500.00, but reversed and remanded the Judgments based on jury verdicts in favor of the Plaintiffs totaling $517,500.00 in punitive damages against Johnson and Johnson.

After the Missouri Supreme Court denied the applications to transfer the case, the Missouri Court of Appeals, Eastern District, on February 4, 1982, entered its mandate, in accordance with its opinion, stating that the judgment against Johnson and Johnson and in favor of each Plaintiff for actual damages was affirmed and the judgment against Johnson and Johnson in favor of each Plaintiff for punitive damages was reversed and remanded for new trial. The Plaintiffs started proceedings to collect on the actual damage judgments.

Thereafter, on March 8, 1982, the Missouri Court of Appeals, Eastern District of Missouri, stayed the effective date of its mandate, pending further order of the court, and further stated no order requiring payment pursuant to said judgments for actual damages or to enforce said judgments was to be made while the stay of mandate was in effect.

The Missouri Court of Appeals, Eastern District of Missouri, gave notice on March 11, 1982, that it would enter an order amending its mandate of February 4, 1982, holding in abeyance its entry affirming the award of actual damages against Johnson and Johnson pending the resolution of Plaintiffs' punitive damage claims against Johnson and Johnson, unless prior to

March 22, 1982, Plaintiffs filed a petition seeking extraordinary relief in the Missouri Supreme Court.

Thereafter, the Plaintiffs filed their petition seeking extraordinary relief in the Missouri Supreme Court, which was denied by the Supreme Court on April 13, 1982. On April 14, 1982, the Missouri Court of Appeals, Eastern District, entered its order amending its mandate of February 4, 1982, which prevents the Plaintiffs from collecting on the actual damage judgments which have been finally affirmed and to which Johnson and Johnson has no further appeal until the Plaintiffs' claims for punitive damages against Johnson and Johnson are finally resolved.

On or about April 21, 1982, the Plaintiffs filed their notice of appeal to the Supreme Court of the United States with the Missouri Court of Appeals, Eastern District.

The Plaintiffs are being deprived of their property without due process, in violation of the 14th Amendment to the U. S. Constitution, on the award of actual damages to which Johnson and Johnson has exhausted all rights of appeal, due to the order of the Missouri Court of Appeals, Eastern District, of April 14, 1982, amending its mandate prohibiting the Plaintiffs from collecting on the judgments for actual damages until the Plaintiffs' punitive damage claims have been finally resolved. Said action by the Missouri Court of Appeals, Eastern District, permits Johnson and Johnson to invest Plaintiffs' money (award of actual damages) at the current money market rates which are considerably higher than the 9% interest Johnson and Johnson is required to pay under the Missouri Statute 1978 R.S.Mo. §408.040 on the judgments for actual damages while the punitive damages are litigated and finally resolved. Johnson and Johnson will use the interest it is able to earn on Plaintiffs' money over 9% to defend the punitive damage claims of Plaintiffs.

Also, the Plaintiffs are being denied the equal protection of the law under the 14th Amendment to the U.S. Constitution because the Missouri Court of Appeals, Eastern District, has in prior cases permitted immediate collections of judgments affirmed on certain claims, even though a new trial is granted on other claims involved in the same litigation. See *Kennedy* v. *Tallent,* 492 S.W.2d 33 (St.L. 1973), and mandate in said case, a copy of which is printed in the Appendix. Note the Missouri Court of Appeals, Eastern District, was formerly known as the St. Louis Court of Appeals.

The jurisdiction of the U. S. Supreme Court to review the April 14, 1982 order of the Missouri Court of Appeals, Eastern District, prohibiting the Plaintiffs from collecting on the judgments for actual damages until the Plaintiffs' claims for punitive damages are resolved is conferred by 28 U.S.C. Section 1257(2).

STATEMENT OF THE CASE

On April 26, 1976, Plaintiff Betty S. Racer, while undergoing a dilatation and currettage operation, suffered second and third degree burns to her left leg and foot and to her right hand when the Johnson and Johnson disposable paper surgical drape which she had been draped with for the surgery burst into flames when the surgeon discarded a smoldering sponge. The 4x8 inch cotton sponge had been ignited when the doctor touched the sponge with the red hot tip of the electrocautery unit while he was cauterizing the patient's cervix. The smoldering sponge landed on or near the edge of the said Johnson and Johnson disposable surgical drape, and the said drape immediately burst into flames when it came into contact with the smoldering sponge.

The Plaintiff Betty S. Racer and her husband filed suit against the surgeon, hospital and Johnson and Johnson for the injuries to Plaintiff Betty S. Racer caused by the burns which

resulted in grafting and hypothalamic amenorrhea, which means she stopped having regular menstrual periods. She also suffers from what her treating psychiatrist, who is board certified and is an examiner for the American Board of Psychiatry and Neurology, describes as the worst case of traumatic neurosis he has seen in his 20 years of practice.

The Plaintiffs also sought punitive damages from Johnson and Johnson, the manufacturer of the paper disposable surgical drape, because prior to April 26, 1976, Johnson and Johnson had in its possession an article appearing in The Fire Journal, Vol. 66, which was published in May, 1972, entitled "Hospitals and Flammable Fabrics", which stated The Oakland Sunday Tribune published a feature article on the use of new, highly-flammable paper products in hospitals, complete with photographs of products in flame. The article further stated that Dr. J. P. Sommers, Supervisor of Operating Room Products Research for Johnson and Johnson, had conversations with operating room personnel and he was told that the cautery unit was a potential cause of fire in the operating room.

Research was done by Johnson and Johnson and other members of the Disposable Association two years prior to the date of the article, (1970), trying to incorporate flame retardants into the repellent disposable operating room drapes. However, at the time the article was published, no acceptable repellent-retardant treatment for disposable drapes had been developed.

Johnson and Johnson, even with the aforesaid knowledge, continued to market its disposable drapes and had its sales representatives make representations to hospital, doctors, etc. that Johnson and Johnson's disposable drapes meet or exceed Federal, State and Local flammability requirements for operating room products, even though there are no Federal standards which had been developed on April 26, 1976, for operating room drapes. Also, the color sales brochure of Johnson and Johnson's disposable drapes stress the drape is for

safe secure draping. Also, other literature published by Johnson and Johnson states that its disposable drapes meet rigid standards of performance and safety.

Johnson and Johnson's expert witness admitted its disposable drape will not pass the National Fire Prevention Association Standard 702 classification test of non-textile clothing and is labeled flammable under The Flammable Fabrics Act Test CS191-53. A cotton surgical drape will not even ignite under The Flammable Fabrics Standard Test CS191-53. The expert also admitted that newspaper and some toilet tissue burn at the same rate as the Johnson and Johnson disposable drape.

There was absolutely no warning on the package containing the Johnson and Johnson disposable drape regarding the flammability of said drape.

After a week long trial, a rural St. Francois County, Missouri jury returned verdicts in favor of Plaintiffs for actual damages totaling $382,500.00 and apportioned it 98% to Johnson and Johnson and 2% to the physician. The jury also awarded punitive damages in favor of Plaintiffs against Johnson and Johnson totaling $517,500.00.

The Missouri Court of Appeals, Eastern District of Missouri, entered its opinion on September 22, 1981, affirming the award of actual damages in favor of Plaintiffs and against Johnson and Johnson but reversed and remanded for new trial on the punitive damage judgments because the Missouri Approved Instruction on strict liability failure to warn had not been modified, requiring the jury to find Johnson and Johnson had prior knowledge of the flammability of its paper disposable surgical drape.

On February 4, 1982, the Missouri Court of Appeals, Eastern District, filed its mandate and Plaintiffs started the process to collect on the judgments for actual damages. Johnson and

Johnson then filed its motion requesting the Missouri Court of Appeals, Eastern District, to amend its mandate of February 4, 1982, to prohibit the Plaintiffs from collecting on the actual damage judgments against Johnson and Johnson until the Plaintiffs' claims for punitive damages against Johnson and Johnson had finally been resolved.

Thereafter the Missouri Court of Appeals, Eastern District on March 11, 1982, gave notice it would amend its mandate prohibiting the Plaintiffs from collecting on the judgments for actual damages against Johnson and Johnson until the Plaintiffs' claims for punitive damages had been finally resolved. The Plaintiffs sought an extraordinary writ from the Missouri Supreme Court to prevent the Missouri Court of Appeals, Eastern District, from amending its February 4, 1982 mandate. However, the writ was denied by the Missouri Supreme Court on April 13, 1982.

Thereafter, on April 14, 1982, the Missouri Court of Appeals, Eastern District, entered its order preventing the Plaintiffs from collecting on the judgments for actual damages until the Plaintiffs' claims for punitive damages are finally resolved, even though Johnson and Johnson has exhausted all rights of appeal on the actual damages judgments.

The Plaintiffs, on or about April 21, 1982, filed their notice of appeal to the U.S. Supreme Court with the Missouri Court of Appeals, Eastern District.

THE FEDERAL QUESTION IS SUBSTANTIAL

The award for actual damages, to which Johnson and Johnson has no further appeal, is final because it has exhausted all of its rights of appeal on the judgments for actual damages in favor of Plaintiffs. Johnson and Johnson has liability insurance coverage which may pay all of the said judgments for actual damages or all of it but any deductible that is included in the policy.

The Missouri Statute allows only nine percent (9%) interest on judgments, 1978 R.S.Mo. §408.040. It is common knowledge, of which this court can take judicial knowledge, that ever since the verdicts and judgments were entered in favor of Plaintiffs on December 21, 1979, and against Johnson and Johnson, the prime interest rates have been and will in all likelihood continue to exceed nine percent (9%) and at times exceeded twenty percent (20%).

Plaintiffs are prejudiced and are damaged by being deprived of the right to collect on the actual damages judgments pending the final disposition of their punitive damages claims.

Johnson and Johnson and its liability carrier will clearly receive a financial windfall at the detriment and prejudice to Plaintiffs, due to The April 14, 1982 order of the Misosuri Court of Appeals, Eastern District, because Johnson and Johnson, who stipulated at trial that its corporate net worth was One Billion, Seven Hundred Million, Eight Hundred Twenty-Eight Thousand Dollars, ($1,700,828,000.00), will use the reserves that it has set aside for Plaintiffs' award of actual damages and invest the reserves at the prime interest rate. Johnson and Johnson, and its insurer, will be able to invest $460,000.00 (which is the approximate amount of the actual damages plus interest as of April 14, 1982), at approximately 17% interest and earn $78,200.00 per annum but only be required to pay 9% per annum on said sum to Plaintiffs, which is

$41,400.00, resulting in Johnson and Johnson being able to finance the defense to Plaintiffs' claims for punitive damages on the difference between the yield at 9% and 17% per annum, which is $36,800.00 per year. In other words, Plaintiffs' property will be used by Johnson and Johnson and its insurer to defend Plaintiffs' claims for punitive damages.

No one on the face of this earth can say this is fair or just and particularly where the Missouri Court of Appeals, Eastern District, in its opinion of September 22, 1981, found that Plaintiffs made and proved a case of punitive damages against Johnson and Johnson, but reversed the jury verdicts in excess of a half million dollars for punitive damages against Johnson and Johnson because the Approved Missouri Instructions were not modified regarding Johnson and Johnson's prior knowledge of the flammability of its drape, even though all the evidence regarding the flammability of Johnson and Johnson's drape came out of the files of Johnson and Johnson through Plaintiffs' discovery. Who is being punished? How must the injured Plaintiffs view the turn of events in this case?

It is clear that it would be a gross miscarriage of justice to permit Johnson and Johnson to retain the money awarded for actual damages to Plaintiffs, and to which Johnson and Johnson has no further right of appeal. The Plaintiffs are being deprived of their property, in violation of the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

Courts have held it is a denial of due process for a state to prevent a judgment creditor the right to collect on a judgment because the enforcement of the payment of a judgment is a property right which is beyond the power of a state to destroy. 16 Am Jur 2d *Constitutional Law*, §598.

The Missouri Supreme Court, two years after Missouri became a state, held a Missouri statute that stayed the execution on judgments for 2½ years unless the judgment creditor agreed to accept property in lieu of money at ⅓ of its value unconstitutional, because the judgment creditor had a right to enjoy the sum of money immediately and to deprive him of that right violated the U.S. Constitution. *Bailey* v. *Gentry*, 1 Mo. 164 (1822), cited in head note 2 §710, Constitutional Considerations, 30 Am Jr. 2d *Executions*.

In 30 Am Jur 2d, *Executions*, §696, the following is stated to-wit:

> "Some sound reason must exist for withholding from a judgment creditor, even temporarily, the aid of the state in the enforcement of his judgment . . .
>
> . . . As a general rule, it may be stated that a stay of execution is required only where an existing right of the judgment debtor is jeopardized."

The Missouri Appellate Courts have allowed collection in lawsuits involving a number of claims on judgments which have been affirmed on appeal, even though a portion of the case has been remanded for a new trial involving another claim between the parties. See *Kennedy* v. *Tallent*, 492 S.W.2d 33, 40 (St. L. 1973); *Kaelin* v. *Nuelle*, 537 S.W.2d 226, 237 (St. L. 1976); *Barlow* v. *Thornhill*, 537 S.W.2d 412, 423 (Mo. 1976); and see *Moss* v. *Greyhound Lines, Inc.*, 607 S.W.2d 192 (Mo. E.D. 1980). See appendix for copy of mandate in the *Kennedy* v. *Tallent* case *supra*. Accordingly, the order of the Missouri Court of Appeals denying the Plaintiffs' right to collect on the judgment for actual damages until Plaintiffs' punitive damage claims are finally resolved violates the due process and equal protection clauses of the 14th Amendment to the U. S. Constitution.

CONCLUSION

Two years after Missouri became a state, the Missouri Supreme Court held the Missouri Statute requiring a judgment creditor to discount his judgment if the judgment creditor collected on the judgment immediately was unconstitutional. Now, 160 years later, the Missouri Court of Appeals, Eastern District, by its order of April 14, 1982, deprives the Plaintiffs of their property rights and allows Johnson and Johnson to invest Plaintiffs' property in the money markets and defend Plaintiffs' claims for punitive damages on the amount of interest it will earn above the 9% Johnson and Johnson is required to pay to Plaintiffs under the Missouri Statute on judgments. The order of the Missouri Court of Appeals, Eastern District, which it entered on April 14, 1982, is just as unconstitutional as the Missouri Statute was 160 years ago.

Appellants-Plaintiffs submit this appeal brings before the court substantial federal questions which require plenary consideration for their resolution.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MISSOURI, }
} ss.
COUNTY OF ST. FRANCOIS. }

IN THE CIRCUIT COURT OF ST. FRANCOIS COUNTY, MISSOURI

David Racer and Betty S. Racer
Plaintiffs,

vs.

Dr. William F. Utterman;
Ste. Genevieve County Memorial Hospital;
St. Paul Insurance Company, a corporation; and Johnson & Johnson, a corporation,
Defendants.

Dr. William F. Utterman and
Johnson & Johnson, a corporation,
Third Party Plaintiffs,

vs.

American Hospital Supply Company,
Third Party Defendant.

Case No. 27,514

JUDGMENT

(Filed June 4, 1980)

On Monday, December 17, 1979, came the Plaintiffs, by their attorney, John W. Reid, II; Defendant Dr. William F. Utterman, by his attorneys Douglas Cassity and V. Kenneth Rohrer; Defendant Ste. Genevieve County Memorial Hospital, by its attorneys Robert A. Wulff, Francis Toohey, Jr. and Kim A. Moore; Defendant Johnson & Johnson, by its attorneys William W. Evans, David L. Colson and John T. Herbert, Jr., and Third Party Defendant American Hospital Supply Company, by its attorney, Keith G. Phoenix; and all parties announce ready for trial. A Jury was selected, and the members were, to-wit:

Jeanne M. Forrester
Dennis E. Cox
William V. Bauer
Rhonda Kay Phares
Norma L. Doty
Jean Ann Lewis
Joyce N. Merritt
Arthur M. Moon
Barbara A. Edgin
Wanda M. Pope
W. Cledith Reeder
Joseph D. Holloway

In addition, two alternate Jurors, Mildred G. Yount and Myra J. Rhodes, were selected; but they were excused at the conclusion of the case prior to deliberations.

Said Jurors being good and lawful people and residents of St. Francois County, Missouri, who being duly selected, tried, and sworn the issues herein joined well and truly to try, the trial progressed; and at the conclusion of Plaintiffs' case, the Third Party Plaintiffs-Defendants dismissed their Third Party suit

against Third Party Defendant American Hospital Supply Company, and the remaining claims were submitted to the Jury at the conclusion of all the evidence and instructions were given by the Court and the case was argued by the attorneys for the parties.

The aforesaid Jurors, upon their oaths, having agreed upon a verdict, at 4:00 a.m. on December 21, 1979, say they find for the Plaintiff Betty S. Racer on her claim for actual damages and against Defendants Johnson & Johnson and Dr. William F. Utterman and assess her actual damages at the sum of THREE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS ($375,000.00), and in favor of Plaintiff David Racer on his claim for actual damages and against Defendants Johnson & Johnson and Dr. William F. Utterman and assess his actual damages at the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00) and apportion said actual damages ninety-eight percent (98%) to Defendant Johnson & Johnson and two percent (2%) to Defendant Dr. William F. Utterman, and find in favor of Defendant Ste. Genevieve County Memorial Hospital.

The Jurors further find in favor of Plaintiff Betty S. Racer on her claim for punitive damages against Defendant Johnson & Johnson and assess punitive damages against Defendant Johnson & Johnson on her punitive damages claim in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,000.00).

The Jurors further find in favor of Plaintiff David Racer on his claim for punitive damages against Defendant Johnson & Johnson on his punitive damages claim in the sum of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS ($17,500.00).

It is therefore considered, adjudged and decreed that Plaintiff Betty S. Racer is hereby awarded a judgment for actual damages in the sum of THREE HUNDRED SEVENTY-FIVE THOU-

SAND DOLLARS ($375,000.00) and Plaintiff David Racer is hereby awarded a judgment for actual damages in the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS ($7,500.00) against Defendants Johnson & Johnson and Dr. William F. Utterman, and the said judgments on actual damages are apportioned ninety-eight percent (98%) to Defendant Johnson & Johnson and two percent (2%) to Defendant Dr. William F. Utterman.

It is further considered, adjudged and decreed that judgment is hereby entered in favor of Defendant Ste. Genevieve County Memorial Hospital on Plaintiffs' claim for actual damages.

It is further considered, adjudged and decreed that judgment is hereby entered in favor of Plaintiff Betty S. Racer on her claim for punitive damages against Defendant Johnson & Johnson in the sum of FIVE HUNDRED THOUSAND DOLLARS ($500,00.00) and Plaintiff David Racer is hereby awarded a judgment on his claim for punitive damages against Defendant Johnson & Johnson in the sum of SEVENTEEN THOUSAND FIVE HUNDRED DOLLARS ($17,500.00).

Costs are taxed against Defendants Johnson & Johnson and Dr. William F. Utterman.

Dated this 21st day of December, 1979.

/s/ Stanley J. Murphy, Judge
Division I, of the Circuit Court
St. Francois County, Missouri

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

DIVISION FOUR

No. 42473

Appeal from the Circuit Court
of St. Francois County

Hon. Stanley J. Murphy, Judge

Betty S. Racer and David Racer,
Plaintiffs-Cross-Appellants,

vs.

Dr. William F. Utterman,
Johnson & Johnson,

and

Ste. Genevieve County Memorial Hospital,
Defendant-Respondent.

OPINION

(Filed Sept. 22, 1981)

This case involves three appeals arising from a judgment in a jury tried personal injury case.

Plaintiff Betty Racer underwent surgery for a dilation and curettage operation in defendant Ste. Genevieve County Memorial Hospital. Defendant William Utterman was the operating surgeon. During the course of the operation a disposable drape manufactured by defendant Johnson and Johnson caught on fire resulting in serious burns to Betty Racer.

She (and her husband on a consortium claim) sued the three indicated defendants. They, in turn, filed cross-claims against each other seeking indemnity or apportionment of any damage award made. The jury found for plaintiffs against Dr. Utterman and Johnson and Johnson, and against plaintiffs in favor of the hospital. It assessed actual damages for Betty Racer of $375,000 and for David Racer of $7,500 which were apportioned by the jury at 2% against Dr. Utterman and 98% against Johnson and Johnson. It additionally awarded punitive damages against Johnson and Johnson of $500,000 in favor of Betty Racer and $17,500 in favor of David Racer. From the judgment in plaintiffs' favor, entered in accord with the jury verdict, Johnson and Johnson and Dr. Utterman have appealed. Plaintiffs have appealed from the judgment in favor of the hospital. We affirm the judgment for actual damages against Johnson and Johnson, reverse and remand the judgment for punitive damages against that defendant, reverse the judgment against Dr. Utterman, and affirm the judgment in favor of the hospital.

Although additional facts will be set forth as we deal with the various contentions raised on appeal, some discussion of the occurrence causing the injury is warranted. On April 26, 1976, Betty Racer was admitted to the hospital for an immediate D & C procedure. She was anesthetized and placed on the operating table. She was then draped with a Johnson and Johnson Lithotomy Pack II gynocological disposable surgical drape which covered her chest, abdomen, perineum, and legs, and which extended to the floor. The drape contains an opening over the vaginal area through which the surgery is performed. The area of the drape around this opening is reinforced with additional layers of material. The doctor, as an added precaution against infection, also covered Betty's legs with Converter leggings, a stocking-like covering.[1] The purpose of the surgical

[1] American Hospital Supply Corporation, manufacturer of the Converter leggings was brought into the suit as a third party defendant, but was dismissed prior to submission of the case to the jury.

drape is to provide a sterile field and to serve as a barrier to prevent bacteria from reaching the operation site. The operation was uneventful until just prior to its conclusion. At that point the surgeon was utilizing a cautery to stop bleeding in the cervix. He was simultaneously using a 4"x8" cotton gauze as a sponge to remove blood so he could locate the bleeding spots. This was normal and usual practice in this type of operation. The hot cautery and sponge were in close proximity and the sponge began to smolder. This also is not uncommon in this type of surgery. The doctor threw the smoldering sponge at the feet of the circulating nurse for her to extinguish. It landed on, under, or very near the surgical drape. As the nurse stepped toward the sponge almost immediately after the doctor threw it, the drape began burning. The nurse threw a pan of water on the drape, but because of the water-repellant characteristics of the drape this had no effect except to possibly intensify the fire. The fire was extinguished in approximately twenty seconds by another member of the operating room team by use of a fire extinguisher obtained from outside the operating room. The doctor and nurse, in the interim, attempted to remove the drape, which had by that time ignited the leggings covering Betty Racer's left leg. Because of the presence of the leggings and the method of the draping, they were unable to fully remove the drape.

The fire, as described by the witnesses, burned at a very nearly explosive rate. Subsequent tests, outside the operating room and in the courtroom, made of the remains of the drape and a drape from the same shipment, also revealed the highly flammable nature of the drape. All of the witnesses for the plaintiff, those present in the operating room and otherwise, testified to their prior belief that the drape was fire-resistant or fire-retardant and a medical textbook (upon which Dr. Utterman relied) containing a similar conclusion was introduced into evidence.

Johnson and Johnson has raised twelve points in its brief. We have reviewed those not hereinafter discussed and conclude that they either are mooted by our conclusions on the points discussed or involve discretionary actions of the trial court in which we find no abuse of discretion. We also do not find the verdicts excessive. We will initially deal with those points relating to the sufficiency of the evidence to support the claim for actual and/or punitive damages and the propriety of the instructions submitting those issues. We will then discuss the submissibility of plaintiffs' case against Dr. Utterman and the hospital.

The Actual Damage Case Against Johnson and Johnson

Plaintiffs based their claim for actual damages upon Section 402A of the Restatement of Torts 2d, commonly referred to as strict liability in tort. It reads as follows:

> "(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

That section was adopted as the law of this state in Keener v. Dayton Electric Manufacturing Company, 445 S.W.2d 362 (Mo. 1969). In supporting its decision to adopt the doctrine of strict liability, the court emphasized that the purpose of the doctrine is "to insure that the costs of injuries resulting from defective products on the market rather than by the injured persons who are powerless to protect themselves." 445 S.W.2d at 364. Section 402A premises liability on the sale of a product in a defective condition unreasonably dangerous to the user or consumer. In *Keener,* the product, a sump pump, was clearly defective as manufactured. In Blevins v. Cushman Motors, 551 S.W.2d 602 (Mo. banc 1977), the doctrine was applied to a product which was not defectively manufactured, but which was unreasonably dangerous because of its design. *See also* Cryts v. Ford Motor Co., 571 S.W.2d 683 (Mo. App. 1978). *Blevins* recognized the existence of the "unavoidably unsafe" product which is the subject of discussion in comment K to Sec. 402A. That comment recognizes that certain useful and desirable products are, under the present state of human knowledge, incapable of being made safe for their intended and ordinary use. "Such a product, properly prepared, *and accompanied by proper directions and warning,* is not defective nor is it *unreasonably* dangerous." (Emphasis supplied except "unreasonably") Comment k, *supra.* Comment j to 402A provides that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use."

Based upon comment j, there has arisen a doctrine of strict liability for failure to warn. Comment k makes it apparent that the obligation to warn is applicable to "unavoidably unsafe" products. Although we have found no case in Missouri specifically dealing with this aspect of strict liability, MAI 25.05 (1978) recognizes the existence of a strict liability failure-to-warn cause of action.

Some courts have been troubled with the concept that a useful product manufactured properly and designed as safely as human knowledge makes possible which contains no warning of danger can meet the "defective condition" requirement of Sec. 402A. Some courts have simply eliminated the requirement of defect. Higgins v. Paul Hardeman, Inc., 457 S.W.2d 943 (Mo. App. 1970); Caplaco One, Inc. v. Amerex Corp., 435 F.Supp. 1116 (E.D. Mo. 1977) [2,3] aff'd., 572 F.2d 634 (8th Cir. 1978); Davis v. Wyeth Laboratories, Inc., 399 F.2d 121 (9th Cir. 1968) [4]; Hamilton v. Motor Coach Industries, Inc., 569 S.W.2d 571 (Tex. App. 1978) [8-11]; Little v. PPG Industries, Inc., 92 Wash.2d 118, 594 P.2d 911 (banc 1979) [1]. Others have concluded that such a product becomes defective because of the absence of a warning. LeBouef v. Goodyear Tire & Rubber Co., 451 F.Supp. 253 (W.D. La. 1978) [1,2,3] *aff'd.*, 623 F.2d 985 (5th Cir. 1980); Outboard Marine Corp. v. Schupbach, 93 Nev. 158, 561 P.2d 450 (1977) [2-4]. We see no need to engage in such semantics. Comment k to the Restatement recognizes that "unavoidably unsafe" products achieve protection despite their danger "when accompanied by proper directions and warning." Otherwise they do not. We believe that the reasons for recognizing the doctrine of strict liability in tort are equally applicable to products unavoidably unsafe which carry no warning or inadequate warning of their danger. Such a position has been generally accepted by the courts of this country.

Johnson & Johnson contends that the evidence fails to establish as a matter of law that the drape is unreasonably dangerous. On the record before us we find the surgical drape here to be an "unavoidably unsafe" product. It is a highly useful product which affords substantially increased protection against infection during surgical procedures. Its water-repellant attributes increase these protections. In the state of knowledge at the time of the injury no method of making the product fire-resistant was available which did not adversely affect its barrier against infection or create potential injury to the patient from

allergy or disease. It is also clear that it is highly flammable.[2] It is designed for gynocological surgery where use of a cautery is not unusual. In such a posture we conclude that the evidence supports the conclusion that liability under Sec. 402A could attach to the drape because of its flammable nature, in the absence of a warning of the danger.

Courts have applied what purport to be two different tests of whether a product is unreasonably dangerous. One is that the product meets the criteria if the seller would be negligent if he sold the product knowing of the risk involved. The second is that set out in comment i to Sec. 402A: "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it." Seattle-First National Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (banc 1975) [2]. As pointed out in Phillips v. Kimwood Machine Company, 269 Ore. 485, 525 P.2d 1033 (banc 1974) [1], the two tests may in fact be the same—simply different directions from which to arrive at the same result. Unless a court can say as a matter of law that the product is not unreasonably dangerous the question is one for the jury. Phillips v. Kimwood Machine Company, *supra*, [5]. We cannot say as a matter of law that this product is not "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it."

Johnson and Johnson also contends that the absence of a warning was not the proximate cause of Betty Racer's injuries. We cannot so conclude as a matter of law. Comment j to Sec. 402A provides that [w]here warning is given, the seller may reasonably assume that it will be read and heeded ...." At least

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[2] Johnson and Johnson presented evidence that its flammability was less than that shown by plaintiffs' evidence. We, of course, review the evidence most favorable to plaintiffs. Even Johnson and Johnson's expert testimony reflected a burn rate comparable to newspaper and some toilet tissue.

one court has held this language to create a presumption of causation in failure-to-warn cases. Menard v. Newhall, 135 Vt. 53, 373 A.2d 505 (1977) [2-4], Contra; Potthoff v. Alms, 583 P.2d 309 (Colo. App. 1978) [2]. We need not determine whether the comment creates a presumption of causation. Certainly the converse of the comment is true—if there is no warning the manufacturer may reasonably assume that the user will neither read nor heed it. In failure-to-warn cases generally, certainty that the existence of the warning would have prevented the injury is not required. In the absence of compelling evidence establishing that the absence of a warning did not cause the injury the causation question becomes one for the jury. Haberly v. Reardon Company, 319 S.W.2d 859 (Mo. banc 1958) [10,11]; Menard v. Newhall, *supra*. There is no such compelling evidence here. There clearly was no warning of flammability on the product or on the container in which it came. The personnel responsible for the preparation of the operating room and the supplies used therein were unaware of the flammability characteristics of the product until after the fire. The doctor testified to his lack of knowledge of the drape's flammability and gave his opinion that it would not be good medical practice to use such a drape in this type of surgery knowing of its flammability. The proximate causation question was one for the jury.

Johnson and Johnson next contends that the issue of its liability for failure to warn was improperly submitted to the jury under MAI 25.05. The thrust of this argument is that the instruction does not require a finding by the jury of knowledge, actual or constructive, of the defect or dangerous condition of which a warning is required. This contention in turn relies upon certain language found in comment j to Sec. 402A:

> ". . . Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not

> generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, *if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger."* (Emphasis supplied).

The emphasized wording has caused a split of authority among courts of other states. Some courts have held that that language requires a showing by the plaintiff of the manufacturer's knowledge or of his ability to obtain knowledge of the dangerous condition in strict liability failure-to-warn cases. Woodill v. Parke Davis & Co., 79 Ill.2d 26, 402 N.E.2d 194 (1980) [2-4]; Basko v. Sterling Drug, Inc., 416 F.2d 417 (2nd Cir. 1969) [1-6]. Other courts have simply refused to apply the language on the basis that it represents an attempt to reimpose negligence concepts upon an entirely different cause of action. Little v. PPG Industries, *supra,* [2,3]; Phillips v. Kimwood Machine Company, *supra,* [4].

In this state, as in most others, the courts have treated strict liability in tort as a doctrine which looks to the product not to the conduct of the manufacturer or seller. Blevins v. Cushman Motors, *supra,* [4,5]; Cryts v. Ford Motor Co., *supra,* [2,4]; Restatement Torts 2d, Sec. 402A(2) (a). In Blevins v. Cushman Motors, *supra,* the court pointed out that the distinction between negligence and strict liability is that in the former the duty owed is based upon the foreseeability of harm or injury from defendant's conduct while in the latter the liability arises because of the foreseeable *use* of the product, not the foreseeable *harm. See also* Phillips v. Kimwood Machine Company, *supra.* We are unable to see, if we accept the rationale of *Keener* and *Blevins,* why a product dangerous because of an absence of warning, should receive different treatment than a product manufactured with the greatest of care which contains

a defect unknown to the manufacturer. Lawyers (which includes judges) have been steeped in the concepts of fault in personal injury tort actions and there exists a residuum of resistance to imposing liability for the failure to warn of a condition of which the party having the duty to warn is both actually and constructively unaware. At least one court, in dealing with this problem, has treated strict liability in tort as creating constructive knowledge of the defect. Phillips v. Kimwood Machine Company, *supra,* [4]. That approach comports with established and traditional concepts of law, but we find it more useful to recognize that strict liability is not a traditional cause of action as it now exists and that knowledge, fault or conduct of the defendant is simply no longer relevant. Cryts v. Ford Motor Co., *supra,* [2,4]. Strict liability in tort imposes a duty on the manufacturer not to introduce into commerce an unreasonably dangerous product—whether that danger arises from defective manufacture, defective design, or failure to warn of danger. The breach of that duty occurs by the act of introducing such product into commerce. That is the only conduct which is relevant to the manufacturer's breach of duty.

At any rate, we do not find the emphasized language of comment j pertinent in this case for at least two reasons. First, by its language it appears to be limited to those products which are either ingested or placed in contact with the body and where the injury results from the interaction of the product (or an ingredient of the product) with the body itself. Normally, this would encompass drugs. If as a matter of public policy (Davis v. Wyeth Laboratories, Inc., *supra,* [4]) or as a rule of reasonableness (Little v. PPG Industries, *supra,* [3]), it is necessary to afford protection to products of this nature whose value is recognized and whose dangers are not only unknown but incapable of determination, the emphasized language can serve as a vehicle to do so. The surgical drape involved here does not meet that criteria. Secondly, we note that the language utilized goes beyond the normal rules of constructive knowledge

to a point approaching, if not reaching, an impossibility of knowledge. Clearly knowledge of the flammability characteristics of the surgical drape here was not beyond "the application of reasonable developed human skill and foresight." We find no error in the submission of plaintiffs' actual damage claim.

The Punitive Damage Claim

As to punitive damages, Johnson and Johnson first contends that strict liability in tort and punitive damages are inconsistent theories and that punitive damages may not be awarded in a strict liability case. We do not find the theories inconsistent. In Sharp v. Robberson, 495 S.W.2d 394 (Mo. banc 1973), the court recognized that willful and intentional conduct is the antithesis of negligence and therefore punitive damages for the former could not be awarded in an action based on the latter. The Court also recognzied that certain species of negligence rising to the degree of indifference to or conscious disregard for the safety of others were not inconsistent with negligence. This was based upon the court's analysis of Reel v. Consolidated Inv. Co., 236 S.W. 43 (Mo. 1921). That analysis was as follows:

> "Thus, *Reel* did not require that plaintiff's actual damages be premised on conduct which would authorize punitive damages. What *Reel* did allow was for a plaintiff to obtain his actual damages based upon a jury finding of ordinary negligence and, in addition thereto, if the evidence supported the submission, to allow the award of punitive damages. *Reel* did not require as a prerequisite to the award of actual damages that the jury find the actual damages were occasioned by that degree of fault necessary to the submission of punitive damages." 495 S.W.2d at 397.

As we interpret *Sharp* and *Reel*, the plaintiff is not allowed to recover punitive damages if the conduct upon which punitive

relief is sought is inconsistent with the conduct for which actual damages are sought. If, however, the theory upon which actual damages are recovered is not inconsistent with proof that a higher level of fault exists than that which supports the actual damage award, then plaintiff is entitled to seek punitive damages for that higher degree of fault. Applying *Sharp* and *Reel*, it is apparent that no inconsistency exists between recovery under strict liability and recovery of punitive damages. The only conduct required of a defendant to make him liable under strict liability is that he placed an unreasonably dangerous product into commerce. The degree of fault is immaterial to recovery under this theory—it may run from total innocence to deliberate intention to inflict harm. If plaintiff, in addition to proving the conduct necessary to support the strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered.

The record supports such a submission here. There was evidence, not all of which we have set forth, from which a jury could have found that Johnson and Johnson placed the drape in commerce knowing and intending that it be used for surgery where a cautery would be in use; that the defendant was actually aware for several years of the flammability of its product and knew or should have known that users of the product would not be so aware; that it knew that the flammability and intensity of burning rendered the product dangerous when used in operations such as the plaintiffs'; that defendant in its selling activities represented the product to be safe for operations such as plaintiffs' and represented that the drape met governmental flammability standards which were in fact non-existent. From such findings a jury could have found an indifference to, or conscious disregard for, the safety of others sufficient to support a punitive damage award.

However, we must reverse and remand the punitive damage awards because, as Johnson and Johnson contends, the issue

was not properly submitted to the jury. The matter was submitted to the jury under MAI 10.02 which authorizes an award of punitive damages if the jury found that the conduct of defendant set forth in MAI 25.50 showed complete indifference to or conscious disregard for the safety of others. The notes on use for 10.02 state that it is the appropriate instruction for exemplary damages "in connection with a claim for actual damages based on ordinary negligence . . . ." MAI 25.05 does not submit a claim for ordinary negligence for failure to warn which would include a requirement of defendant's knowledge, actual or constructive, of the danger involved and of his negligence in failing to warn. As we have heretofore stated, the only conduct required to be submitted (and in fact submitted) under plaintiffs' strict liability theory was that it placed a dangerous product in commerce without a warning of the danger. Defendant's fault in so doing was in no way submitted to the jury in either 25.05 or 10.02, and a finding of fault sufficient to justify punishment is essential to recovery of exemplary damages. Otherwise, the jury could award punitive damages simply because it considers that an example should be made of any defendant who markets a dangerous product whether he knows of the unreasonable danger or not.

Here there was evidence from which a jury could have found that, while defendant was aware that its product was flammable (virtually everything is if enough heat is applied), it was not aware of its high degree of flammability or its intensity of burning. There was evidence that the ignition potential of the drape from contact with heat sources other than flame was much less than from flame and that flame would not normally be present in an operating room, even though other heat sources might be. There was also evidence that defendant knew that the drape was to be used in a controlled environment with a crew of persons to extinguish any moderately burning fire or to remove the drape if a fire commenced. There was also evidence that the reinforced opening through which the surgery was performed was less

flammable and burned with less intensity than the remainder to the drape. This is the area of the drape in which contact with the cautery would normally be anticipated. The jury could have found that while the drape was in fact unreasonably dangerous, the defendant was not aware that it was unreasonably dangerous when used as intended, and in the absence of such knowledge was not indifferent to or in conscious disregard of the safety of others in marketing the product. The failure of the instruction to include a finding of such knowledge was erroneous.

Dr. Utterman's Appeal

Dr. Utterman contends that plaintiffs failed to make a submissible case against him because of the absence of expert testimony to establish his negligence.

Plaintiffs' original petition premised relief against Dr. Utterman upon general negligence grounds. Pursuant to an order of the court, this petition was amended to state the specific grounds of negligence against the doctor. In their amended petition, plaintiffs, while pleading specific negligence, stated that such pleading, in compliance with the court's order, "does not mean that plaintiffs abandon their original negligence pleading . . . ."[1] At trial, plaintiffs established the specific activities in the operating room which caused the burns sustained by Betty Racer. The case was submitted to the jury on the hypothesis that Dr. Utterman "discarded a smoldering and burning sponge onto a surgical drape" and was thereby negligent.

Plaintiffs invoke the accepted doctrine that a patient undergoing surgery who sustains an injury to a healthy part of the body not involved in the operation establishes a case under the *res ipsa loquitur* doctrine. Meyer v. McNutt Hospital, 173

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[1] We need not and do not reach the effect of such a statement of non-abandonment.

Cal, 156, 159 P. 436 (1916) [5]; Oldis v. La Societe Francaise de Bienfaisance Mutuelle, 130 Cal. App.2d 461, 279 P.2d 184 (1955) [1,2]; Poor Sisters of St. Francis v. Long, 230 S.W.2d 659 (Tenn. 1950) [3]. Betty Racer's injuries here meet the tests of that doctrine. However, it is also established that *res ipsa loquitur* creates a presumption or inference of negligence, and where plaintiff clearly establishes the specific cause of the injury the presumption or inference disappears from the case. Powell v. St. Joseph Ry., Light, Heat and Power Co., 336 Mo. 1016, 81 S.W.2d 957 (1935) [4-7]; Bratton v. Sharp Enterprises, Inc., 552 S.W.2d 306 (Mo. App. 1977) [1-3]. Plaintiffs did establish the specific cause of the injury and the doctor's actions which led to that cause. There was, therefore, no further presumption or inference of negligence and it was plaintiffs' burden to establish that the doctor's actions were negligent.

It is an accepted principle in this state that expert medical testimony is ordinarily necessary to establish what constitutes due care and skill of a surgeon under the circumstances of a particular case. Hart v. Steele, 416 S.W.2d 927 (Mo. 1967) [7,8]. There was no such evidence here. Plaintiffs did not establish, nor did any of the defendants, that Dr. Utterman was aware, or should have been aware, of the flammable nature of the drape. Plaintiffs' own expert gave his opinion that Dr. Utterman, in the absence of knowledge of the flammable nature of the drape, used the degree of skill and learning a licensed physician ordinarily should use under the same or similar circumstances in disposing of the burning sponge while engaged in an operation. Plaintiffs are bound by the uncontradicted testimony of their own witness. Furlong v. Stokes, 427 S.W.2d 513 (Mo. 1968) [7].

Plaintiffs assert that there were other methods of disposing of the sponge and that the jury could decide that, in view of the options, the method used by the doctor was negligent. There were also explanations why, in the operating room environment, such alternatives were not acceptable. The evidence was uncon-

tradicted that throwing a smoldering sponge at the feet of the circulating nurse was an acceptable method for a doctor concentrating on surgery to use to dispose of the offending item. We do not believe that a jury has sufficient knowledge of operating room procedures, the procedures which the surgeon must follow, the duties of the operating room personnel, and the environment of the operating room to make a determination that Dr. Utterman acted negligently in the absence expert medical testimony to that effect. No contention is advanced, because the evidence clearly established the contrary, that igniting the sponge constituted negligence. The evidence was not sufficient to make a submissible case against Dr. Utterman.

Plaintiffs' Appeal of Judgment for Ste. Genevieve Hospital

Plaintiffs' appeal from the judgment in favor of Ste. Genevieve Hospital is based upon the contention that the evidence established as a matter of law that the hospital was liable under the strict liability theory and that certain instructional errors occurred in respect to that defendant. The hospital responds by contending that no submissible case was made against it on either of plaintiffs' two theories—strict liability and *res ipsa loquitur*. Plaintiffs in their brief attempt to support a submissible case against the hospital only on the strict liability theory. Johnson and Johnson attempts to support a submissible case against the hospital on both theories. We entertain some reservations about the standing of Johnson and Johnson to raise the issue, but will not further extend this opinion by discussing that matter. Suffice it to say that for the reasons set forth in dealing with Dr. Utterman's appeal, we do not find *res ipsa loquitur* applicable here.

We also do not find a submissible case against the hospital on a strict liability theory. There was no evidence of negligence by the hospital because there was no evidence it knew or should

have known of the dangerous nature of the drape. Plaintiffs base their claim of a submissible case on the contention that the hospital was a "seller" of the drape under Sec. 402A. We are unable to so conclude. The "seller" referred to in Sec. 402A is one "engaged in the business of selling such a product." There is no evidence that the drape was sold by the hospital to plaintiffs or that the hospital was in the business of selling disposable drapes. The hospital purchased the drape for its own use in treating patients. In this respect the hospital is in no different position than any other business which purchases goods for its own use in conducting its business. We can see no reason to extend the application of Sec. 402A to such situations nor have we found any courts which have done so. *See,* Vergott v. Deseret Pharmaceutical Company, Inc., 463 F.2d 12 (5th Cir. 1972); Silverhart v. Mount Zion Hospital, 20 Cal. App. 3d 1022, 98 Cal. Rpt. 187 (1971). The purposes of Sec. 402A would not appear to be served by such an extension.

Plaintiffs rely upon Cunningham v. MacNeal Memorial Hospital, 47 Ill.2d 443, 266 N.E.2d 897 (1970), involving blood transfused into a patient by the hospital. We do not find that case applicable nor persuasive. Its application to anything except blood is questionable even in Illinois in view of Dubin v. Michael Reese Hospital and Medical Center, 83 Ill. 2d 277, 415 N.E.2d 350 (1980). Factually it is clearly distinguishable from the drape involved here, and it appears to reflect a distinctly minority position. *See,* Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954); Shivers v. Good Shepherd Hospital Inc., 427 S.W.2d 104 (Tex. App. 1968); Brody v. Overlook Hospital, 127 N.J. Super. 331, 317 A.2d 392 (App. 1974), *aff'd.* 66 N.J. 448, 332 A.2d 596 (1975); Sawyer v. Methodist Hospital, 522 F.2d 1102 (6th Cir. 1975); Gile v. Kennewick Public Hospital District, 296 P.2d 662 (Wash. 1956); and *see* Sec. 431.069, RSMo 1978. We conclude that plaintiffs failed to make a submissible case against the hospital.

Judgment as to Ste. Genevieve County Memorial Hospital affirmed, judgment as to Dr. William Utterman is reversed, judgment against Johnson and Johnson and in favor of each plaintiff for actual damages affirmed, judgment against Johnson and Johnson in favor of each plaintiff for punitive damages reversed and remanded for new trial.

/s/ Gerald M. Smith, Judge

/s/ Harold L. Satz, Presiding Judge - Concurs

/s/ Paul J. Simon, Judge - Concurs

APPENDIX C

No. 63606

IN THE SUPREME COURT OF MISSOURI

ED #42473

January Session 1982

Betty S. Racer and David Racer,
Plffs.-Cross-Appellants,

vs.

Dr. William F. Utterman,
Johnson & Johnson,
Defts.-Cross-Appellants,

and

Ste. Genevieve County
Memorial Hospital,
Defendant-Respondent.

TRANSFER

(Filed Jan. 18, 1982)

Now at this day, on consideration of Plffs.-Cross-Appellants' Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

Now at this day, on consideration of Deft.-Cross-Appellant's Application to transfer the above entitled cause from the Eastern District Court of Appeals, it is ordered that said application be, and the said is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1982, and on the 18th day of January 1982, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 18th day of January 1982.

/s/ Thomas F. Simon, Clerk.

APPENDIX D

STATE OF MISSOURI, }
City of St. Louis. } ss.

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

MANDATE

(February 4, 1982)

Betty S. Racer, et al,
Respondents

vs.

Dr. William F. Utterman, M.D.
Johnson & Johnson and
Ste. GEnevieve County
Memorial Hospital,
Appellants

No. 42473

Circuit Court of
St. Francois County
No. 27514, Division I

The Court, being sufficiently advised of and having considered the premises adjudges that the judgment rendered herein by the Circuit Court of St. Francois County, in its cause No. 27514, be affirmed as to Ste. Genevieve County Memorial Hospital, judgment as to Dr. William Utterman is reversed, judgment against Johnson and Johnson and in favor of each plaintiff for actual damages affirmed, judgment against Johnson and Johnson in favor of each plaintiff for punitive

damages reversed and remanded for new trial, in accordance with the opinion of this Court herein delivered September 22, 1981. Opinion by Gerald M. Smith, Judge, concurred in by Harold L. Satz, Presiding Judge and Paul J. Simon, Judge.

STATE OF MISSOURI, ss.

I, RONALD N. BELLAMY, Clerk of the Missouri Court of Appeals, Eastern District, certify that the above and foregoing is a full, true and complete transcript of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said

Court, at office in the City of St. Louis this 4th day of February 1982.

/s/ Ronald N. Bellamy
Clerk, Missouri Court of
Appeals, Eastern District.

APPENDIX E

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 42473

Cir. Ct. St. Francois
County No. 27514, Division I

Betty S. Racer, et al.,
Respondents,

vs.

Johnson & Johnson, et al.,
Appellants.

ORDER

(Filed March 8, 1982)

Effective date of mandate stayed pending further order of this court. No order requiring payment pursuant to said judgment or to enforce said judgment shall be made while the stay of mandate is in effect.

SO ORDERED

DATE: MARCH 8, 1982

/s/ Gerald M. Smith,
Presiding Judge
Division IV
Missouri Court of Appeals
Eastern District

CC: All attorneys of record

STATE OF MISSOURI,
City of St. Louis } ss.

I, RONALD N. BELLAMY, Clerk of the Missouri Court of Appeals, Eastern District, certify that the foregoing is a true copy of the order delivered by this court in the foregoing entitled cause on the 8th day of March, 1982, as fully as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at office, in the City of St. Louis this 8th day of March 1982.

/s/ Ronald N. Bellamy
Clerk, Missouri Court of Appeals, Eastern District

APPENDIX F

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 42473

Betty Racer, et al.,
Respondents,

vs.

Dr. William F. Utterman, et al.,
Appellants.

NOTICE TO ATTORNEYS

(March 11, 1982)

The court will enter the following order in the above case at 11:00 a.m., March 22, 1982, unless prior thereto a petition seeking extraordinary relief is filed in the Supreme Court of Missouri:

> "Mandate of February 4, 1982, is amended to add thereto between the words "September 22, 1981" and "Opinion by" the sentence: "Entry of judgment against Johnson and Johnson for actual damages to be held in abeyance pending resolution of punitive damage claim." Stay of effective date of mandate entered on March 8, 1982 is hereby quashed."

DATE: MARCH 11, 1982

/s/ Gerald M. Smith, Judge
Division IV
Missouri Court of Appeals
Eastern District

CC: John W. Reid, II
David L. Colson
William W. Evans
Robert A. Wulff
V. Kenneth Rohrer
J. Douglas Cassity
Francis Toohey, Jr.
Robert G. Brady

APPENDIX G

No. 63883

IN THE SUPREME COURT OF MISSOURI

January *Session, 1982*

Betty S. Racer, et al.,
Plaintiffs,

vs.

Missouri Court of Appeals,
Eastern District, Judges of -
Chief Judge John J. Kelly, Jr.,
et al.,
Defendants.

PROHIBITION

(Filed April 13, 1982)

Now at this day, on consideration of the petition for a writ of Prohibition herein to the said respondents, it is ordered by the court here that the said petition be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1982, and on the 13th day of April 1982, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 13th day of April, 1982

/s/ Thomas F. Simon, *Clerk.*

/s/ Norma Jean Cresch *D. C.*

APPENDIX H

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 42473

Betty S. Racer, et al,
Respondents,

vs.

Johnson & Johnson, et al,
Appellants.

ORDER

(Filed April 14, 1982)

Mandate of February 4, 1982 is amended to add thereto between the words "September 22, 1982." and "Opinions by" the sentence: "Entry of judgment against Johnson and Johnson for actual damages to be held in abeyance pending resolution of punitive damage claim."

Stay of effective date of mandate entered on March 8, 1982 is hereby quashed.

SO ORDERED.

DATE: April 14, 1982

/s/ Gerald M. Smith,
Presiding Judge
Division Four
Missouri Court of Appeals
Eastern District

CC: John W. Reid, II
David L. Colson
William W. Evans
Robert G. Brady
Francis Toohey, Jr.
J. Douglas Cassity
V. Kenneth Rohrer
Robert A. Wulff

APPENDIX I

IN THE MISSOURI COURT OF APPEALS FOR THE EASTERN DISTRICT OF MISSOURI

Missouri Court of Appeals
Eastern District
Case No. 42473

Betty S. Racer and
David Racer,
Appellants,

vs.

Johnson and Johnson and
Dr. William F. Utterman and
Ste. Genevieve County Memorial
Hospital,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(April 20, 1982)

Notice is hereby given that Betty S. Racer and David Racer, the Appellants above named, hereby appeal to the Supreme Court of the United States from the final order of the Missouri Court of Appeals, Eastern District of Missouri, entered April 14, 1982, amending its Mandate of February 4, 1982, said amended mandate prevents the Appellants from collecting on the Judgment for actual damages against Appellee, Johnson and Johnson, until the Appellants' claim for punitive damages has been finally resolved against Appellee Johnson and Johnson, even though Appellee Johnson and Johnson has exhausted all rights of appeal on the Judgment for actual damages in favor of Appellants.

This appeal is taken pursuant to United States Code Title 28, Section 1257(2). The Appellants, in accordance with U.S. Supreme Court Rule 10(4) do hereby further state Appellees, Dr. William F. Utterman and Ste. Genevieve County Memorial Hospital, have no interest in the outcome of this appeal.

Respectfully submitted,

/s/ John W. Reid, II
SCHNAPP, GRAHAM & REID
135 East Main Street
Fredericktown, MO 63645
314-783-7212

Attorney for Appellants

APPENDIX J

MISSOURI COURT OF APPEALS

Eastern District
Wainwright State Office Building
111 North Seventh Street
St. Louis, Missouri 63101

Office of the Clerk

Area Code 314
444-6960

April 30, 1982

Mr. John W. Reid, II
Schnapp, Graham & Reid
Attorneys at Law
135 East Main Street
Fredericktown, Missouri 63645

Re: Betty S. Racer and David Racer vs.
Johnson and Johnson, et al.
No. 42473

Dear Mr. Reid:

This will acknowledge receipt of your Notice of Appeal to the Supreme Court of the United States and your letter under date of April 20, 1982, in which you request that I certify and transmit to the Supreme Court of the United States the entire record in the above referenced cause, both of which were filed of record here on April 21, 1982.

Please accept my apology for the delay in responding. Your letter and the file did not reach my desk until April 27th and the press of other business has precluded an earlier response. This is a regrettable consequence of having three of my five deputy

clerks off the job due to temporary medical disability, including pregnancy and post-partum recovery.

The estimated cost of duplicating the entire record would amount to $941.85 plus postal charges. In addition I would impose a reasonable charge for numbering the documents to be certified and preparing a list thereof as provided by United States Supreme Court Rule 13.2 as well as for certifying each portion of the record. I would estimate these latter charges would amount to approximately $350.00, for a total estimated cost of $1,291.85. Given current staffing, it may require two to three weeks to accomplish the duplication, transmittal and certification of the entire record.

I might add in passing that it does not appear at all necessary to the Court to duplicate the entire record. The Court is of the view that only the opinion and post opinion filings are necessary to a determination of the issue(s) on appeal to the United States Supreme Court.

I suggest the following alternative, which we have used previously without adverse reaction from the United States Supreme Court or from the parties.

Pursuant to Rule 13.3 of the United States Supreme Court, on order of the presiding judge of the Court from which the appeal is taken, the original record may be certified up. The only costs to you for this service would be for postage and for certification of the various portions of the record, which costs most likely would not exceed thirty (30) dollars. I would strongly recommend this alternative in view of its obvious economies and in view of our current staffing shortages as this could be accomplished within a business day or two.

The only disadvantage to this procedure, of which I am aware, is the concomitant lack of availability of the file for in-

spection here while it is in use in the United States Supreme Court, and this normally does not present a problem for the parties since counsel's records are available.

Kindly advise as to your wishes, and please direct your reply to my personal attention.

I am,

Yours very truly,

/s/ RONALD N. BELLAMY
Clerk

APPENDIX K

May 3, 1982

Mr. Ron Bellamy, Clerk
Missouri Court of Appeals
Eastern District
Wainwright State Office Building
111 North Seventh Street
St. Louis, Missouri 63601

RE: Racer vs. Johnson & Johnson
Case No. 42473

Dear Mr. Bellamy:

This will acknowledge receipt of your letter of April 30, 1982, regarding filing the record in the U. S. Supreme Court in the above-captioned case. I agree with you that we should follow Rule 12 of the U. S. Supreme Court in filing the records with the U. S. Supreme Court, as outlined in your letter.

I have enclosed a check for the estimated cost of $30.00 as stated in your letter to complete the filing of the record.

Also, please send a certified copy of the Notice of Appeal showing the Notice of Appeal filed in your Court which I will need in preparing the jurisdictional brief.

Thanking you for your cooperation in this matter, I remain

Very truly yours,

John W. Reid, II

JWR/bz
Enclosure

APPENDIX L

STATE OF MISSOURI, } ss.
City of St. Louis. }

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

JANUARY SESSION, 1973
TUESDAY, FEBRUARY 20, 1973.

Nos. 34566
and 34581

Circuit Court of Madison
County, No. 3386.

Tom Kennedy and Violet
Kennedy, His Wife,
Respondents,

and

Kay Kennedy, a Minor, b/r/f
Tom Kennedy,
Respondent-Appellant,

vs.

James Tallent,
Appellant-Respondent.

Now again come the parties aforesaid, by their respective attorneys, and the Court, being now sufficiently advised of and concerning the premises, doth consider and adjudge that those parts of the judgment rendered herein by the Circuit Court of Madison County as to Violet, and as to Tom for Violet's injuries and his loss of consortium, be and are hereby sustained; that those parts of the judgment of the aforesaid Court as to

Tom and Violet for damages to their car, as to Kay for her personal injuries, and as to Tom for Kay's injuries, be reversed; and that the said cause be remanded to the aforesaid Court for a new trial on the issue of damages only.

Per Curiam Opinion filed.

STATE OF MISSOURI, ss.

I, ROSA C. CURSON, Clerk of the Missouri Court of Appeals, St. Louis District, certify that the above and foregoing is a full, true and complete transcript of the judgment rendered in the above entitled cause, as fully as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of
said Court, at office in the City of St.Louis this 15th day of March,
A. D., ninteen hundred and seventy-three.

Rosa C. Curson
Clerk Missouri Court of Appeals,
St. Louis District.

Office - Supreme Court, U.S.
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BETTY S. RACER, *et al.*,
Appellants,

v.

JOHNSON & JOHNSON, a corporation,
Appellee.

On Appeal from the Missouri Court of Appeals,
Eastern District

MOTION TO DISMISS

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St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

No. 81-2217

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

BETTY S. RACER, *et al.*,
Appellants,

v.

JOHNSON & JOHNSON, a corporation,
Appellee.

On Appeal from the Missouri Court of Appeals,
Eastern District

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that this appeal be dismissed on the grounds that it is not within the jurisdiction of this Court and that it does not present a substantial federal question.

Appellants seek to bring before this Court the issue whether, as a matter of federal constitutional law, a state court may refuse to permit execution on a portion of a judgment pending disposition of the entire case. Here, the Missouri Court of Appeals has simply held that under traditional procedural rules, Appellants' judgment on a jury verdict for actual damages is not final until their still-pening claim for punitive damages has been disposed of. This Court does not have jurisdiction of Appellants' attempted appeal for four independent reasons:

1. Under 28 U.S.C. §1257, this Court has appellate jurisdiction over state court rulings which constitute "final judgments or decrees." Appellants' very complaint here is that the Missouri courts have not recognized their actual damage award as a final judgment. This is simply a matter of state law interpretation by the Missouri courts, and thus the admitted absence of finality dooms the attempted appeal.

2. Section 1257(2) is limited in its terms to final state court judgments sustaining "the validity of a statute of any state" which has been challenged on constitutional grounds. No state statute is involved in this case. The Missouri courts have simply applied well-accepted jurisprudential and procedural concepts to this case in ruling that a verdict for actual damages does not constitute a final judgment as long as the punitive damage claim remains pending.

3. No substantial federal question is presented by this would-be appeal. The suggestion that Appellants are being denied due process and equal protection by not being permitted to execute on their actual damage verdicts until the conclusion of the case borders on the frivolous. The well-established policy of the avoidance of piece-meal litigation and the universal acceptance of the final judgment rule are answers enough to Appellants' constitutional arguments.

4. At no time during the proceedings in the Missouri courts did Appellants ever attempt to raise any federal consitutional issues. None of the papers filed in the Missouri Court of Appeals or in the Missouri Supreme Court by Appellants made any mention of the due process or equal protection questions which they now ask this Court to review. Thus, Appellants are also in violation of the requirement that the federal constitutional questions must be raised and preserved at the earliest practicable time in the state proceedings. Here, the issue posed by Appellant's Jurisdictional Statement was not timely and properly raised and was not passed on by the Missouri Courts.

CONCLUSION

For the reasons stated, this appeal should be dismissed for want of jurisdiction or, the alternative, for want of a substantial federal question.

Respectfully submitted,

THOMAS C. WALSH,
Counsel of Record
ROBERT G. BRADY
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St. Louis, Missouri 63102
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